

09/641,410

(Kiely)

GAU 1794

Appeal to the BPAI

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**(ix) - Evidence appendix**

- 1) Exhibits - A - L, pg. 2; 68 pages
- 2) Exhibit What is MMC - Tuwien  
"Composite Material" - General Definition - 1 page
- 3) Exhibit - Patent to Musher (US 2,217,700) - 8 pages

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**(x) - Related Proceedings****Appendix A - Related Appeals and Inferences Section** from the Appeal to the Board of Patent

Appeals and Interferences of Application SR. No. 11/903,722 Method of

Supporting a Comestible on 4/12/2011, 11 pages

(Also please see the additional Exhibits from the Appeal on 4/12/2011 referenced from this section at the Patent and Trademark Office)

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supported comestible is non-frozen.

6. { The edible support of claim 1 wherein said support is a composite material, having a plurality of ingredients, said edible support being suited for a plurality of configurations and orientations, wherein said support is a candy bar, wherein said support is a cookie bar, wherein said support is a granola bar.
7. The edible support of claim 1 wherein said support has homogeneous ingredients, said support being suited for a plurality of configurations and orientations, wherein said support has the ingredients comprising: dextrose, maltodextrin, citric acid, magnesium stearate, and flavoring, wherein said support is made of marshmallow.
8. The edible support of claim 1 wherein said support is malleable, said malleable support being suited for a plurality of orientations and configurations, wherein said support is made of licorice.
9. The supported comestible of claim 1 wherein said

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comprising: a mold, a plurality of tools, a plurality of ingredients, a set of instructions, a plurality of appendages, said mold, tools, ingredients, instructions, and appendages, being suited to construct a predetermined supported comestible, said comestible kit being suited to construct frozen and non-frozen supported comestibles.

18. The supported comestible of claim of 1, further including a combined mold and protective packaging apparatus, for manufacture of said supported comestible, wherein said apparatus has an aligning device for aligning said support.

19. A supported comestible comprising:

(a) a body of an edible substance, and

(b) an edible support suitable for supporting said body,  
→ wherein said support is a composite material, having a plurality of ingredients, said edible support having a first portion extending into said body, said first portion having sufficient surface area within said body, to support said body, said edible support having a second portion extending outside said body, said second

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portion having sufficient size to provide a utilitarian support for said body, said support being suited for a plurality of configurations and orientations.

20. The supported comestible of claim 1 wherein said second portion has sufficient size so that a person can hold said body and said edible support with a hand.

(21) { The supported comestible of claim of (19) wherein said support is a candy bar.

(22) { The supported comestible of claim of (19) wherein said support is a cookie bar.

(23) { The supported comestible of claim of (19) wherein said support is granola bar.

24. A supported comestible comprising:

- (a) a body of an edible substance, and
- (b) an edible support suitable for supporting said body, wherein said support has homogeneous ingredients, said edible support having a first portion extending into said body, said first portion having sufficient surface

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Art Unit: 1761 99

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 76-81, 89, 90, 94 and 96 are rejected under 35 USC 112, first paragraph for being based on a non-enabling disclosure.

In regard to claim 76, claim 76 can be construed to recite that the edible support comprises one or more elements a through m, and particulate matter and a homogenous comestible. The claim is based on a non-enabling disclosure, since it is not seen that the specification supports one or more of elements a through m as well as having particulate matter and be homogenous. In fact, since the edible support is disclosed as being a composite, how can it be homogenous? The two are mutually inconsistent. Clarification and/or correction of the claim language is requested. That is, if the particulate matter and homogenous comestible are additional to the support, the claims, should reflect this. For purposes of examination, since applicant has not defined composite edible support, this phrase will be construed to mean any two materials in contact with each other. Claim 77 recites that the additional confection provides a "lollipop configuration". Neither claim nor the specification is clear as to what this means. Claim 79 recites that the supported comestible includes means for inhibiting the breakage of the edible support. As disclosed, it is not clear what is this "means for inhibiting breakage". Similarly in claim 80 for the phrase means for providing a supported comestible "designed for a child". How would this supported comestible differ from any other? What makes the comestible "designed for a child"? Claim 81 shares a

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ALSO SEE  
EXHIBIT J

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Art Unit: 1701  
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DIVISIONAL

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The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

- 1) Claims 53-78 are rejected under 35 U.S.C. 102(b) as being anticipated by Musher (US 2217700).

Note: It is noted that applicant's claims are directed to "a method of supporting a frozen comestible comprising an edible material, said edible material comprises two materials" in case of independent claim 53, in case of independent claims 63 and 72 "a method of supporting a frozen comestible comprising an edible composite material" and in case of independent claim 72 further limits the composite material comprises two materials, said two materials comprise said edible composite material". The limitations recited in some of the dependent claims (specifically claims 54, 59-62, 65, 70-71, 73, 77-78) are listed in the alternative and if the prior art applied in the non-final rejection of 4/1/2010 meets one of the alternative choices of the respective claims, it reads on the claims.

Regarding claims 53-57, 60-67, 69, 72-76 and 78, Musher teaches a method of making ice cream (frozen comestible) having an edible support structure that is an edible composite material (as it may be made of multiple materials like corn flakes, wheat flakes, bran flakes (cereal or grain) that are bound together by a binding agent; see Page 1: Column 1, lines 37-46; Page 2: Column 1, lines 1-10 and 33-43; Page 3: Column 2, lines 69-76; and Page 4: Column 1, lines 1-12). The support as taught by Musher (figures 1-6) comprise of various individual edible confectionary ingredients or materials, for example, cereal flakes, sugar, candy flakes, a binder, an edible moisture resistant barrier (like oils), or ribbons, grains, hard fat flakes or ribbons (Page 1, column 1 to Page 5, column 2, line 40; Page 5: Column 2, lines 46-56 and Page 6: Column 1, lines 35-47) that may be combined to form the support which may comprise a handle (Page 5: Column 2, lines 50-58; Page 1: Column 1, lines 37-46).

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09/641,410 SPECIFICATION (printed from divisional 11/903,722) GAU 1794 Kiely

[0163] Preferably, support 62 is an elongated and slenderized, multi-ingredient, candy bar (made to a suitable size and shape to support the confection) such as those found at the check-out counter of a grocery store.

[0164] One such candy bar has the ingredients of a whipped chocolate nougat center that is then coated with a thick chocolate coating (barrier 86), sold under the trademark Three Musketeers by Mars, Incorporated of Hackettstown, N.J. Another suitable candy bar that contains the ingredients of a whipped chocolate nougat center 90, topped with a thick layer of caramel 88, which is then totally dipped in a thick chocolate coating 86 (FIG. 27D), is one sold under the trademark Milky Way, also by Mars, Incorporated. (The ingredients and barrier or chocolate coating 86 are not specifically shown in support 62 in FIGS. 1 and 2, for clarity, but are shown in FIGS. 15A, 27A-E). Another suitable candy bar for an edible support is made with the ingredients of an elongated dense cookie, coated on top with a thick layer of caramel, which is then dipped in a chocolate coating, (FIG. 27B) such as the one sold under the trademark Twix, also by Mars, Incorporated. A frozen Twix candy bar efficiently supports confection 84.

[0165] Other candy bars that are also suitable as edible supports for confection 84, such as the one sold under the trademark Butterfinger, by Nestle Incorporated, of Glendale, Calif., has the ingredients of ground roasted peanuts, dipped in a thick chocolate coating (and other ingredients) and one sold under the trademark Snickers, also by Nestle, has peanuts, caramel and a chocolate



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coating. Another candy bar sold under the trademark 100 Grand, also by Nestle, has the ingredients of chewy caramel, milk chocolate and crispy crunchies (FIG. 27C). 100 Grand candy bar, if slenderized, elongated and frozen is an efficient support 62 for confection 84. A candy bar sold under the trademark Baby Ruth, also by Nestle, with the ingredients, peanuts, caramel and nougat, also if slenderized is a rich, edible support for confection 84. Other suitable candy bars are the candy bars sold under the trademarks Mounds and Almond Joy, both by Hershey Foods Corporation, of Hershey, Pa. These supports may be any size, length, width, shape or thickness.

FIG. 13A  
COMPOSITE  
MATERIAL

A bite size additional fun ingredient 100, sold under the trademark Nestle Bites also of Nestle Incorporated, which has several flavors, may be added to confection 84 or an edible support for additional enjoyment. These candy bars offer a familiar and desired taste to many people in the United States and to many people of other countries throughout the world.

[0166] A chocolate covered and slenderized granola bar or cereal bar also is an efficient support 62. One such granola bar is sold under the trademark Kudos by Mars, Incorporated, of Hacketstown, N.J. This granola bar when shaped, frozen and inserted into softened ice cream or frozen yogurt and placed in the freezer provides a totally edible, supported, and nutritious frozen confection.

[0167] Popular fudge cookies sold under the trademark Fudge Shoppe Fudge Sticks and Fudge Shoppe Peanut Butter Fudge Sticks by The Keebler Corporation of Elmhurst, Ill., have multi-layered wafered cookie ingredients, may be dipped in a thick fudge coating, and easily used to support a small confection 84 or confection 102 for a child or small portion.

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[0168] A chocolate covered fudge candy, sold under the trademark Riesen Candies and made in Germany, by Storck USA of Chicago, Ill. is adaptable to support confection 84 if elongated and frozen. A candy bar sold under the trademark Cadbury Caramello of Hershey Foods Corporation, of Hershey Pa., if unsegmented, supports confection 84. Another candy bar sold under the trademark Heath Bar also by Hershey Foods, serves well as support 62.

COMPOSITE MATERIAL USED AS AN INGREDIENT [0169] Additional fun ingredients 100 (FIGS. 13A, 13B) may also be added as a separate piece of candy (gum, gelatin figure, etc.) that is shaped like a toy, such as an animated cartoon, a figure, or animal, etc. Additional fun ingredient 100 may be placed inside or outside confection 84 or inside or outside an edible support to be a "treasure find" (not shown) for a child. A treasure or prize may be placed in each pop or one may be placed in a single pop or in a box of a number of pops, for a "lucky winner."

NESTLE BITES

EXHIBIT A, pg. 7  
FIG. 13A - ITEM 100

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COMPOSITE  
MATERIAL  
SUPPORT

[0221]

See:  
SPECIFICATION

[0214]

OR:  
"SUPPORT 62"

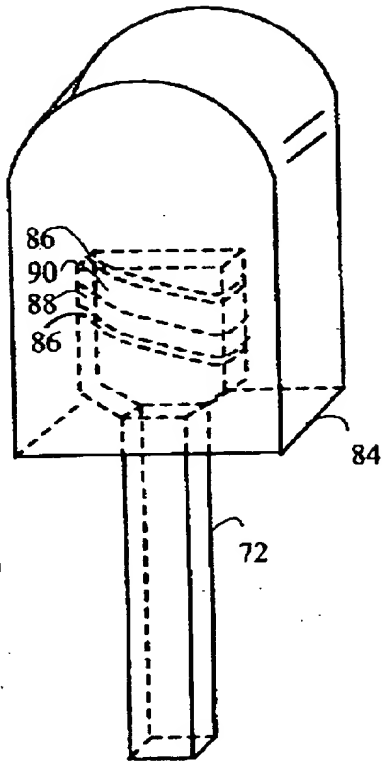


Fig. 15A

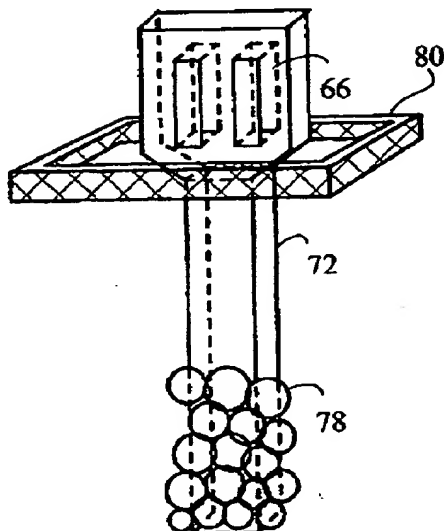


Fig. 15C

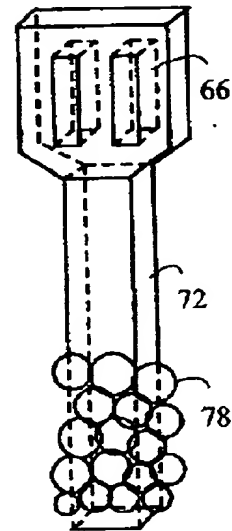


Fig. 15B

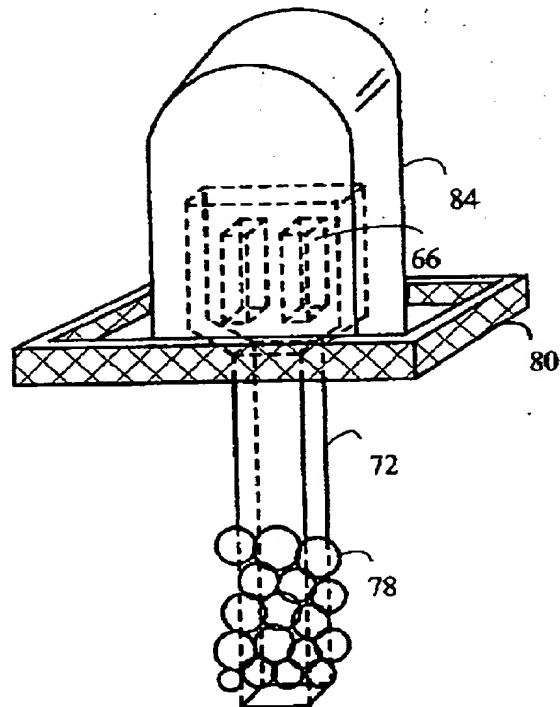


Fig. 15D

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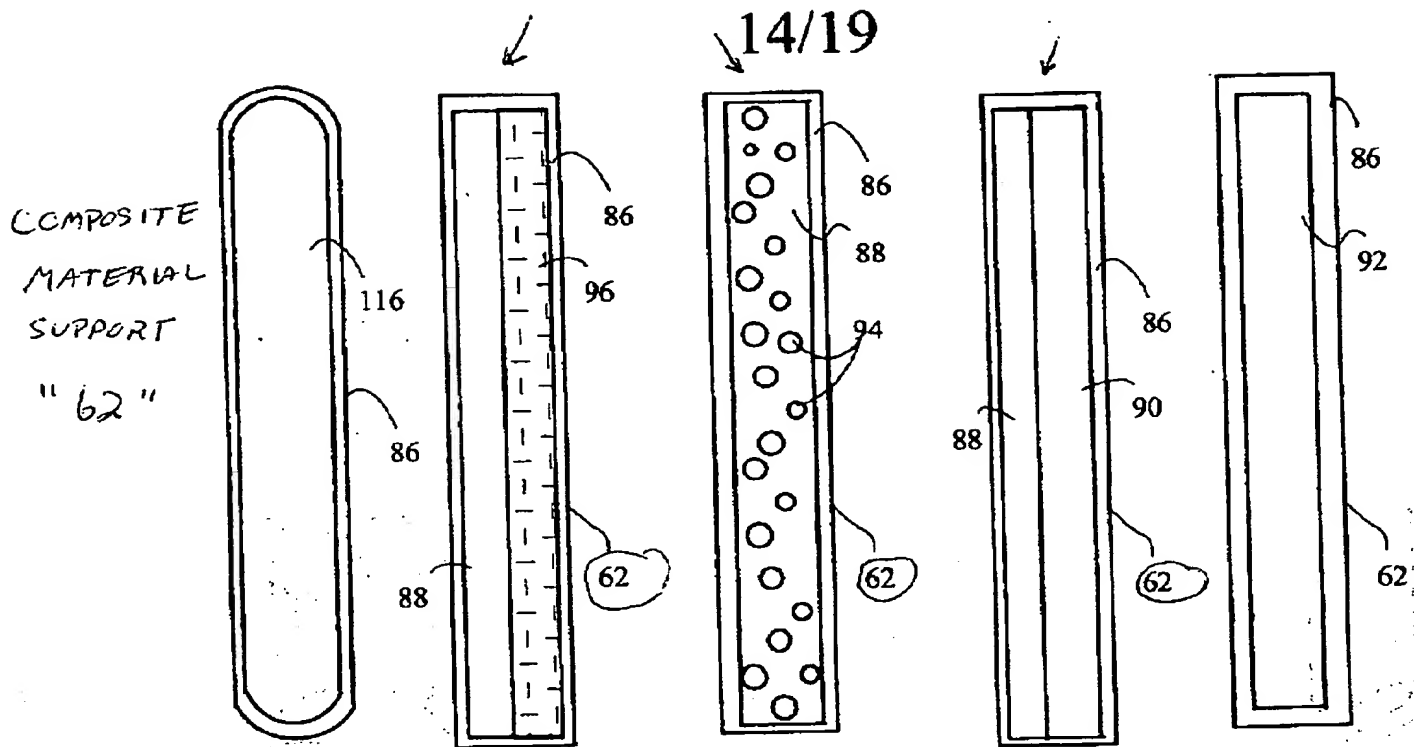


Fig. 27A

Fig. 27B

Fig. 27C

Fig. 27D

Fig. 27E

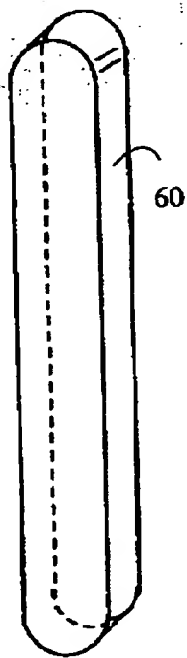


Fig. 28

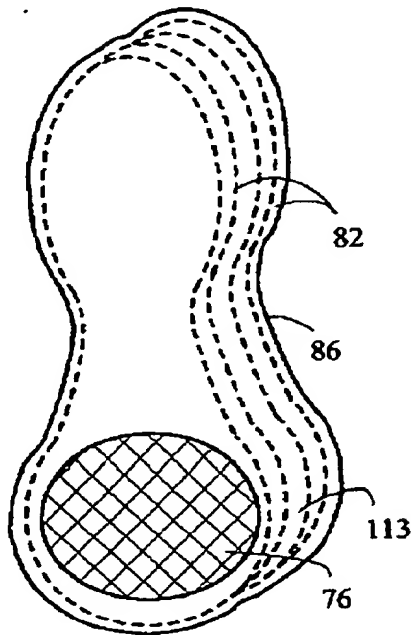


Fig. 29

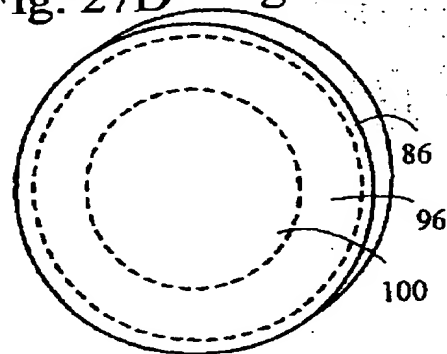


Fig. 30

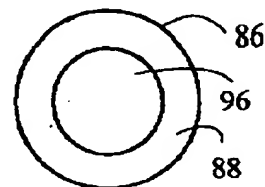


Fig. 31

EXHIBIT A. pg. 11 09/641,410 GAU 1794 (REPLY TO NFOA) KIELY 104

JAN-16-2009 07:04P FROM: DANIEL KIELY 9142456661

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Amendment A

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**Remarks - General**

Applicant submits that all claims clearly define novel and unobvious subject matter over each and every reference and any combination thereof.

**Amendments to Specification**

Examiner stated that the amendment filed July 30, 2008 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: the addition of "composite material" in paragraphs [0043] [0044] and [0166], which was not disclosed in the specification as originally filed and has also been added to claims. The term "a composite material" as disclosed in the amendment would introduce new matter and change the description from "a candy bar" to "a composite material candy bar" in paragraph [0164] which is not the same as a generic term "candy bar" as originally described. Therefore, the amendments to the specification introduce new matter and the applicant is required to cancel the new matter in the reply to this Office Action.

See 608.01(I) **Original Claims** In establishing a disclosure, applicant may rely not only on the description and drawing as filed but also on the original claims if their content justifies it.

Where subject matter not shown in the drawing or described in the description is claimed in the application as filed, and such original claim itself constitutes a clear disclosure of this subject matter, then the claim should be treated on its merits, and requirement made to amend the drawing and description to show this subject matter. The claim should not be attacked either by objection or rejection because this subject matter is lacking in the drawing and description. It is the drawing and description that are defective, not the claim.

In response, as said in previous responses to office actions, correcting the specification to reflect what is in the original claims, as filed, is NOT introduction of new matter.

Applicant's original disclosure August 18, 2000, illustrated and recited, "a composite material."

The mere mention that "composite material" changes the description from a "candy bar" to a